STATE OF MICHIGAN
IN THE THIRD JUDICIAL CIRCUIT COURT

KRISTINA KARAMO; PHILIP O'HALLORAN, MD; BRADEN GIACOBAZZI; TIMOTHY MAHONEY; KRISTIE WALLS; PATRICIA FARMER; and ELECTION INTEGRITY FUND AND FORCE, a Michigan non-profit corporation,

Plaintiffs,

v

JANICE WINFREY, in her official capacity as Detroit City Clerk; and CITY OF DETROIT BOARD OF ELECTION INSPECTORS, in their official capacity,

Defendants.

Case No. 22-012759-AW

Hon. Timothy M. Kenny

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DEFENDANT JANICE WINFREY'S RESPONSE TO PLAINTIFFS' MOTION FOR DISQUALIFICATION OF THE THIRD JUDICIAL CIRCUIT BENCH

INTRODUCTION

Plaintiffs come to this Court with the radical demand that *the entire Third Judicial Circuit bench* should be disqualified from adjudicating their Complaint, while Plaintiffs' counsel admits, under penalty of perjury, that "there is no personal bias" by Third Circuit judges against Plaintiffs. Hartman Aff ¶ 1(c). The lawsuit they seek to transfer outside of Wayne County is a blatant effort to disenfranchise Detroit voters in direct violation of the Constitution of the State of Michigan. The Plaintiffs demand, among other things, that "[t]he Court should declare that only Absentee Ballots that have been requested in person can be validly voted," (Complaint ¶ 27), and "[t]he court should require all Detroit voters to vote in person or obtain their ballots in person at the clerk's office," (*Id.* ¶ 131). Plaintiffs do not even attempt to hide the racist underpinnings of their demands. They only want one City's voters to be disenfranchised—the City of Detroit—the city with the largest African-American population in the State. Plaintiffs understand that no Wayne County judge would consider such a contemptible violation of the Michigan Constitution and such a serious assault on the will of the people.[1]

Incredibly, Plaintiffs do not even attempt to hide the weakness of their argument. Plaintiffs actually establish the case *against* disqualification when they cite *Tumey v Ohio*, 273 US 510 (1927) for the proposition that a judge must recuse him or herself "if there is a direct, personal, substantial pecuniary interest in the outcome of a case, and that *mere personal bias or prejudice is not enough to require recusal*." Pls' Motion ¶ 6 (emphasis added). Indeed, the only basis for disqualification offered by Plaintiffs is the claim that "[t]he County clerk and the 3rd

[1] In 2018, Michigan voters overwhelmingly approved Proposal 3, amending the Michigan Constitution to guarantee that every citizen of the United States who is an elector qualified to vote in Michigan shall have: "[t]he right, once registered, to vote an absent voter ballot without giving a reason, during the forty (40) days before an election, and the right to choose whether the absent voter ballot is applied for, received and submitted in person or by mail." Const 1963, art 2, § 4(g).

Circuit Bench work closely on every case and are nearly intertwined." Hartman Aff ¶ 1(b). Of course, it is not true that the County Clerk and the Circuit Court bench work closely on every case. But, even if it were true, the Wayne *County* Clerk is not a party to this action—Plaintiffs have sued the Detroit *City* Clerk. There is no basis whatsoever for the disqualification of the entire Third Judicial Circuit bench in this matter under statute, common law, or reason. Plaintiffs' motion should be denied and Plaintiffs' counsel should be sanctioned for bringing this frivolous and offensive motion.

ARGUMENT

Plaintiffs are not entitled to disqualification of the entire Third Judicial Circuit bench under Michigan Court Rule 2.003, the standard articulated by the United States Supreme Court in *Caperton v A.T. Massey Coal Co, Inc*, 556 US 868 (2009) (as incorporated into MCR 2.003(C)(1)(b)), or any other basis.[2] In *Caperton*, the Supreme Court held that due process requires "recusal when the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Id*. at 872 (quotation marks omitted). "The inquiry is an objective one. The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral or whether there is an unconstitutional 'potential for bias.'" *Id*. at 881. On the basis of Plaintiff's Motion, the probability of actual bias in this case is zero.

Due process does not require a judge to be completely disinterested. *Caperton*, 556 US at 879, 887-88. The critical question is "whether, under a realistic appraisal of the psychological

[2] Subsections (a) through (g) of MCR 2.003(C)(1) enumerate reasons that warrant disqualification of a judge—not one applies here. Plaintiffs do not contend that any Third Circuit judge is biased or prejudiced for or against a party or attorney. MCR 2.003(C)(1)(a). Plaintiffs do not contend that any Third Circuit judge has personal knowledge of disputed evidentiary facts concerning the proceeding. MCR 2.003(C)(1)(c). Plaintiffs do not contend that any Third Circuit judge has been consulted or employed as an attorney in the matter in controversy. MCR 2.003(C)(1)(d). Nor do Plaintiffs invoke any other provision in subjections (e) through (g).

tendencies and human weakness, the interest poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *Id*. at 883-84. In fact, "most matters relating to judicial disqualification do not rise to a constitutional level." *Id*. at 876. The glaring contrast between the facts at issue in *Caperton* and the potential "appearance of impropriety" suggested by Plaintiffs demonstrates why this motion is wholly without merit.

Caperton arose out of review by the West Virginia Supreme Court of a $50 million verdict against Massey Coal Company. *Id*. at 872. After the verdict, but prior to the filing of an appeal, West Virginia held its 2004 judicial elections. Knowing that an appeal was imminent, Massey Coal's CEO spent approximately $3 million supporting the election of Justice Benjamin, his preferred candidate for the West Virginia Supreme Court. *Id*. at 873. This spending exceeded the total amount of all other contributions to Benjamin's campaign. *Id*. After Benjamin won election, the court took the appeal of the verdict. Benjamin denied the plaintiff's motion to disqualify based on the appearance of bias created by the campaign contributions and joined an opinion reversing the $50 million verdict, based on reasoning a dissenting justice called "morally and legally wrong." *Id*. at 874.

Here, Plaintiffs have identified no objective facts indicating that the "probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." Instead, Plaintiffs offer speculation about bias that, even if taken at face value, is patently nonsensical. Plaintiffs claim that, because elections for the Wayne County bench are conducted by the Wayne County Clerk, the judges of the Wayne County bench would be less likely to make a decision adverse to the Wayne County Clerk. Hartman Aff ¶¶ 1(a)-(d). But Plaintiffs have not sued the Wayne County Clerk: they have sued the Detroit City Clerk. In apparent

acknowledgment of this problem, Plaintiffs claim that "[t]he relationship between the Wayne County clerk and the Detroit City clerk . . . is significant." *Id.* ¶ 1(h). But they offer no explanation whatsoever why this supposed relationship creates a probability of actual bias arising to the level of a due process violation cognizable under *Caperton*.

Plaintiffs' arguments for disqualification also have no merit under case law interpreting MCR 2.003. Under Michigan law, "[a] trial judge is presumed unbiased, and the party asserting otherwise has the heavy burden of overcoming the presumption." *Mitchell v Mitchell*, 296 Mich App 513, 523; 823 NW2d 153 (2012). Generalized allegations of bias based on a judge's professional relationships are insufficient to justify disqualification. *US Fidelity Ins & Guar Co v Michigan Catastrophic Claims Ass'n*, 484 Mich 45, 46; 773 NW2d 243 (2009). "[D]isqualification for bias or prejudice is only constitutionally required in the most extreme cases." *Cain v Michigan Dep't of Corrections*, 451 Mich 470, 498; 548 NW2d 210 (1996).

Plaintiffs' request for disqualification of the *entire* Third Circuit bench is wholly unsupported by Michigan law. For example, in *Deveroux v Tucker*, unpublished per curiam opinion of the Court of Appeals, issued February 13, 2014 (Docket No. 310592) 2014 WL 588074 (attached as Exhibit A), plaintiff sought to disqualify the entire Macomb County Circuit Court bench on the basis that she had asserted claims against one of the judge's clerks. *Id*. at *1. The plaintiff argued that the "close working relationship" between the court clerk and the circuit judges created an unreasonable probability of bias and required disqualification of the entire bench under MCR 2.003(C)(1)(b). *Id*. The trial court denied the motion and the Court of Appeals affirmed, noting that "there is no precedent requiring that an entire bench disqualify itself simply

because the employee of one judge is a party to the action." *Id*. at *2.[3] Here, there is simply no potential for bias. Neither the Detroit *City* Clerk nor the Wayne *County* Clerk are employees of any judge on the Third Circuit, and Plaintiffs' averment that "[a]n adverse determination by a Judge against the County Clerk [who is not a party] has a strong probability that hard feelings would affect the working relationship between the clerk and the court," (Hartman Aff ¶ 1(d)), invokes an argument completely untethered from the facts and a standard that exists neither in law nor reason.

With the slightest due diligence Plaintiffs would have learned that their extraordinary demand for disqualification of the entire Wayne County Circuit Court bench has no legitimate basis in fact or law. Pursuant to MCR 1.109(E)(6), and this Court's inherent authority, Plaintiffs' counsel should be sanctioned appropriately. Defendant Janice Winfrey seeks full reimbursement of her attorney fees so wrongfully incurred.

[3] *Cf. Special Wayne Prosecutor v Recorder's Court Judges*, 409 Mich 1119 (1980), in which the Michigan Supreme Court ordered the recusal of the Wayne County Recorder's Court bench. There, the underlying matter was the criminal prosecution of a Recorder's Court judge. The judge at issue had been indicted by a grand jury and it appeared that all of the Recorder's Court judges were subjects of the grand jury investigation. The Michigan Supreme Court ordered the entire bench recused because dismissal of the case by a Recorder's Court judge "could have been viewed as an attempt by the sitting judge to interfere with the criminal investigation into his or her own behavior." See *People v Kilpatrick*, 482 Mich 946, 947; 753 NW2d 631 (2008) (Kelly, J., Concurring) (discussing the Special Wayne Prosecutor decision). The objective appearance of bias at issue in *Special Wayne Prosecutor* bears no relationship whatsoever to Plaintiffs' claim of potential bias here.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for disqualification of the Third Judicial Circuit bench should be denied.

Respectfully submitted,

October 28, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2022, I electronically filed the foregoing paper with the Clerk of the Court using the MiFILE system, which served a copy on all counsel of record registered for efiling in this matter.

/s/ Nathan J. Fink
Nathan J. Fink

Exhibit A

2014 WL 588074
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Tami H. DEVEROUX, Plaintiff–Appellant,
v.
Lawrence N. TUCKER, Lake Shore Public Schools, Martha Kleibert, and Rhoda Esler a/k/a Rhonda Esler, Defendants–Appellees,
and
City of St. Clair Shores, St. Clair Shores Police Department, John Doe 1, John Doe 2, John Doe 3, City of Grosse Pointe Farms, Grosse Pointe Farms Department of Public Safety, John Doe 4, John Doe 5, John Doe 6, John Doe 7, John Doe 8, Detective D. Spens, Officer William Porter, Officer Matthew Steppey, Badge 44 Michael Buckley, Badge 52 Matthew Hurner, and Badge 48 Officer Frank Zelinski, Defendants.

Docket No. 310592.
|
Feb. 13, 2014.

Macomb Circuit Court; LC No.2010–004837–CZ.

Before: GLEICHER, P.J., and SAAD and FORT HOOD, JJ.

Opinion

PER CURIAM.

***1** In the course of a long, contentious custody battle, plaintiff Tami H. Deveroux filed a separate civil suit against the father of her child, Lawrence N. Tucker, for allegedly engaging in an ongoing course of action to harass her and interfere with her parental rights. Plaintiff dragged the child's elementary school principal, Martha Kliebert, and school district into the fray and even raised claims against the court clerk, Rhonda Esler, employed by the circuit court judge handling the underlying custody proceeding. The circuit court correctly determined that Kliebert, Lake Shore Public Schools and Esler were protected by governmental and quasi-judicial immunity and discerned no question of material fact supporting plaintiff's claims against Tucker. Moreover, the circuit court properly denied plaintiff's unfounded motion to disqualify the entire Macomb circuit court bench from hearing her case. We affirm.

I. JUDICIAL DISQUALIFICATION

Plaintiff sought to disqualify the entire Macomb circuit court bench because defendant Esler was a court employee and plaintiff challenged actions taken by Esler in fulfilling her role as a court clerk. Given the close working relationship between a trial judge and his clerk and the likely relationships Esler had with other court employees, plaintiff contended that there existed an unreasonable risk of bias on the part of any Macomb circuit court judge.

Plaintiff filed her disqualification motion 21 days late and failed to establish good cause to circumvent the filing deadline requirement. See MCR 2.003(D)(1). Plaintiff also failed to comply with MCR 2.003(D)(2)'s requirement that an affidavit accompany all motions for judicial disqualification. Accordingly, the circuit court could have denied plaintiff's motion on purely procedural grounds.

The circuit court instead properly denied plaintiff's motion on the merits. MCR 2.003(C)(1)(b) permits judicial disqualification in the absence of evidence of actual bias as follows:

> The judge, based on objective and reasonable perceptions, has either (*i*) a serious risk of actual bias impacting the due process rights of a party as enunciated in *Caperton v. Massey,* [556] U.S. [868]; 129 S Ct 2252; 173 L.Ed.2d 1208 (2009), or (*ii*) has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct.

As stated in *Caperton,* 556 U.S. at 872, "there are objective standards that require recusal when the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." (Quotation marks and citation omitted .) The question in such a case is "whether, under

a realistic appraisal of psychological tendencies and human weakness, the interest poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *Id.* at 883–884 (quotation marks and citation omitted). As further noted by the Supreme Court, "objective standards may also require recusal whether or not actual bias exists or can be proved. Due process may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *Id.* at 886 (quotation marks and citation omitted). Disqualification is required when the situation "offer[s] a possible temptation to the average judge to lead him not to hold the balance nice, clear and true." *Id.* (quotation marks and citation omitted).

***2** Our Supreme Court has required the disqualification of an entire county bench in the past. For example, in *Special Wayne Prosecutor v. Recorder's Court Judges,* 409 Mich. 1119 (1980), the Supreme Court ordered the disqualification of the entire recorder's court bench and the assignment of a visiting judge to hear a case in which a recorder's court judge was being criminally tried. The disqualification was required because every other recorder's court judge was being investigated by the grand jury and could still face potential prosecution. If any of those judges heard the case and found in the charged judge's favor, "the public reasonably could have seen it as an act of 'self-protection.' " *People v. Kilpatrick,* 482 Mich. 946; 753NW2d 631 (2008) (Kelly, J., concurring) (discussing the *Special Wayne Prosecutor* decision).

However, there is no precedent requiring that an entire bench disqualify itself simply because the employee of one judge is a party to the action. The judge who employed Esler was not assigned to plaintiff's separate civil action, greatly reducing the risk of bias. And the individual circuit court judges tasked with deciding motions in this matter considered their own relationship with Esler before proceeding. Accordingly, we discern no merit in plaintiff's disqualification motion.

II. SUMMARY DISPOSITION OF CLAIMS AGAINST COURT CLERK ESLER

Plaintiff alleges that Esler improperly handled an ex parte order that required her child's continued enrollment in Grosse Pointe Public Schools. Specifically, plaintiff claims that she properly secured an ex parte order while Esler was out of the office, and Esler improperly and unilaterally determined that the order was invalid upon her return to work. Plaintiff takes issue with Esler's communication to principal Kliebert that the order was "forged."

Esler is protected by judicial immunity. In *Maiden v. Rozwood,* 461 Mich. 109, 133; 597 NW2d 817 (1999), quoting 14 West Group's Michigan Practice, Torts, § 9:393, p 9–131, our Supreme Court noted that judicial immunity "is available to those serving in a quasi-judicial adjudicative capacity as well as 'those persons other than judges without whom the judicial process could not function.' " This Court has extended the protection of quasi-judicial immunity to Department of Human Services social workers involved in child protective proceedings and court-appointed psychologists. See *Diehl v. Danuloff,* 242 Mich.App 120, 133; 618 NW2d 83 (2000); *Martin v. Swihart,* 215 Mich.App 88, 94; 544 NW2d 651 (1996). Although this Court has not had the opportunity to consider the immunity available to court or judicial clerks in a published opinion, there is support from the Sixth Circuit Court of Appeals for this proposition. See *Huffer v. Bogen,* 503 Fed Appx 455, 461 (CA 6, 2012); *Johnson v. Turner,* 125 F3d 324, 333 (CA 6, 1997); *Brown v. Glasser,* 869 F.2d 1488 (CA 6, 1989). See also *Oliva v. Heller,* 839 F.2d 37, 40 (CA 2, 1988).

***3** The circuit court misspoke in its written order when proclaiming "a question of fact would exist with respect to whether defendant Esler was acting or reasonably believed she was acting within the scope of her authority." Given the circuit court's other conclusions within its opinion, it clearly found no such question of fact. We similarly find no ground to hold Esler liable for her actions undertaken in her role as a clerk for a circuit court judge.

III. SUMMARY DISPOSITION OF CLAIMS AGAINST KLIEBERT AND LAKE SHORE

Plaintiff challenges Kliebert's alleged interference with her relationship with her child, refusal to remove the child from school when presented with plaintiff's improperly obtained ex parte order, and communication to plaintiff's counsel and a Friend of the Court referee that placed plaintiff in a negative light. Plaintiff's claims against Lake Shore were for vicarious liability. These defendants enjoyed immunity for their actions as well.

MCL 691.1407 provides governmental immunity, in relevant part, as follows:

(1) Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function. Except as otherwise provided in this act, this act does not modify or restrict the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed.

(2) Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service or caused by the volunteer while acting on behalf of a governmental agency if all of the following are met:

(a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.

(b) The governmental agency is engaged in the exercise or discharge of a governmental function.

(c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage.

(3) Subsection (2) does not alter the law of intentional torts as it existed before July 7, 1986.

Lake Shore is a governmental agency. The conduct challenged by plaintiff pertains to the management of its school district—"a governmental function." Accordingly, the circuit court correctly determined as a matter of law that Lake Shore was immune from tort liability.

Kliebert is a "lower-ranking governmental employee or official" and plaintiff pleaded claims of intentional, rather than negligent, torts against her. According to *Odom v. Wayne Co,* 482 Mich. 459, 480; 760 NW2d 217 (2008), we must therefore engage in the following analysis:

***4** If the plaintiff pleaded an intentional tort, determine whether the defendant established that he is entitled to individual governmental immunity under the *Ross* test by showing the following:

(a) The acts were undertaken during the course of employment and the employee was acting, or reasonably believed that he was acting, within the scope of his authority,

(b) the acts were undertaken in good faith, or were not undertaken with malice, and

(c) the acts were discretionary, as opposed to ministerial.

The school defendants provided extensive documentary evidence in support of the school policies promoted by Kliebert's actions. They also provided documentation and evidence regarding plaintiff's volatile, hostile, bizarre and concerning behavior on school grounds and at school functions. Plaintiff did not rebut this evidence supporting that Kliebert was acting within the scope of her authority and acting in good faith when she denied plaintiff access to the child during school hours and declined plaintiff's request to attend a class field trip.

Although defendants presented no written policies governing Kliebert's other actions, they clearly fell within the scope of her authority. Both plaintiff's attorney and the FOC investigator invited Kliebert's response to their communications in Kliebert's role as the school principal. Both letters addressed the child's education and plaintiff's effect on the child's school performance. Moreover, it clearly was Kliebert's duty to investigate the validity of the September 2008 court order before releasing and disenrolling a student. Given plaintiff's conduct the year prior when Tucker attempted to enroll the child's at Rodgers, plaintiff could not establish the necessary bad faith to overcome Kliebert's claim of governmental immunity.

IV. SUMMARY DISPOSITION OF CLAIMS AGAINST TUCKER

Finally, plaintiff alleges that Tucker had harassed her since their child's birth. She claims that he enlisted the help of personal friends in the Grosse Pointe and St. Clair Shores police departments in furtherance of his plans. Plaintiff also claims that Tucker enrolled their child in the Lake Shore schools in violation of court order. The circuit court correctly determined that plaintiff failed to create a genuine issue

of material fact in relation to these claims and summarily dismissed them pursuant to MCR 2.116(C)(10).

First, as noted by the circuit court, any claim related to plaintiff's 2004 and 2009 arrests must fail because plaintiff cannot as a matter of law show that Tucker caused her injuries. Although Tucker instigated the arrests, both were based on probable cause. Plaintiff's 2004 arrest on charges of possessing a stolen car was resolved only when plaintiff returned her wrongfully retained rental vehicle and paid the amount due. Plaintiff pleaded nolo contendere to attempted parental kidnapping/parental interference in relation to her 2009 arrest for parental kidnapping. Accordingly, despite her current protests of innocence, plaintiff cannot establish actual innocence and the circuit court properly determined that she caused her own injuries.

***5** In relation to Tucker's decision to enroll the child at a Lake Shore school, the evidence established as a matter of law that Tucker was permitted to take that action. Pursuant to the February 22, 2008 consent order in the custody proceeding, plaintiff could only maintain the child in the Grosse Pointe school system if she continued her residence at her rented home on Norwood Drive or purchased a home in the school district. Plaintiff was evicted from the Norwood Drive home and she did not purchase a home in Grosse Pointe thereafter. According to the plain language of the court order, Tucker did nothing amiss when he enrolled the child in his school district.

In relation to plaintiff's claim that Tucker had instigated numerous pretextual traffic stops against her, the Grosse Pointe Police Department and individual officers sued in this matter presented evidence that plaintiff had been stopped on three occasions and had received a citation on all three citations. This is contrary to plaintiff's contention that she received a citation on only one occasion. Pursuant to MCR 2.116(G)(4), if a defendant presents evidence supporting its summary disposition motion, "an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial." Even if the circuit court had accepted plaintiff's affidavit accompanying her response to the summary disposition motions, it would not have helped her cause. Plaintiff made no averments about the traffic stops. Accordingly, based on the unrebutted evidence presented by the various defendants, plaintiff could not create a genuine issue of material fact in relation to her claims against Tucker.

We affirm.

All Citations

Not Reported in N.W.2d, 2014 WL 588074

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